IN THE HIGH COURT OF BOMBAY AT GOA

CUSTOMS APPEAL NO. 1 AND 2 OF 2005

Commissioner of Customs & Central Excise, Goa,
Having its office at ICE House, EDC Complex,
Panaji-Goa. .... Appellant

V e r s u s

M/s. Kabul Textiles (LLC),
Post Box No. 51617,
Dubai, U.A.E. .... Respondent

Mr. C. Ferreira, Asst. Solicitor General for the Appellant.

Mr. S.M. Singbal, Advocate for the Respondent.

CORAM: **A. P. LAVANDE &**
N.A. BRITTO, JJ.

DATE : **19.04.2005.**

JUDGMENT(Per N.A. BRITTO, J.)

In these appeals filed under Section 130 of the Customs Act, 1962, (Act, for short), against a common order dated 13.8.2004, of the Customs, Excise and Service Tax, Appellate Tribunal, Mumbai (CESTAT),

the Revenue seeks to raise two questions as substantial questions of law and they are as follows:-

(a) Whether the goods are liable for confiscation under Section 111(d) of the Customs Act, 1962, read with Section 11 of the Foreign Trade(Development & Regulation) Act, 1992 ?

(b) Whether the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962 for misdeclaration ?

2. In order to dispose off these appeals, a few facts are required to be taken note of.

3. On the basis of the information received by the Directorate of Revenue Intelligence (DRI) that M/s. Ayesha Exports and some other Delhi based importers had imported fabrics through containers at Marmagoa Port, by resorting to misdeclaration and undervaluation, the Import General Manifests of seven consignments were scrutinised. Two of such consignments had come in the name of the said M/s. Ayesha Exports, three had come in the name of M/s. R. T. & Co., and two in the name of M/s. Ruchitra Impex, all having their addresses at New Delhi. M/s. Ayesha Exports filed two bills of entry but bills of entry were not filed on behalf of the said M/s. R. T. & Co., or M/s. Ruchitra Impex. Upon investigations

carried out by the Additional Director General, Directorate of Revenue Intelligence, the said Addl. Director General came to the conclusion that the said consignments were misdeclared with a view to evade customs duty. He also found that M/s. R & T Co., as well as M/s. Ruchitra Impex were fictitious persons/companies, though he did not say this in so many words. He also found that the goods which were sought to be imported were in fact not Polyester Knit Fabric as mentioned on the Import Manifests but were classifiable as Polyester Knit Fabric (Man made Warp Knitted Fabric 2 way other than Pile Fabric), which merited classification under Customs Tariff Heading No.6001.92, attracting higher rate of duty and its CIF value was US $ 0.80 per metre as against US $ 0.70 shown on the said Import Manifests.

4. Meantime, the respondent who was the supplier of the said consignments in the name of M/s. R. T. & Co. and Ruchitra Impex, wrote a letter dated 11.04.2001, addressed to the Commissioner of Customs, Goa, for permission to re-export the said consignment on the ground that the consignees had refused to retire the documents from the bank and appointed M/s. Varun Freight Forwarders to represent on their behalf for clearance of the same. The Addl. Director thereafter issued show cause

notices to the said M/s. R. T. & Co., and M/s. Ruchitra Impex dated 19.4.2000, to show cause as to why the said consignments should not be confiscated under Section 111(m) of the Customs Act, 1962; should not be described as "dyed wrapped, cut and piled fabrics (short piles) wholly made of "Polyester Filament Yarn", meriting classification under Customs Tariff Heading 6001.92 as against their classification of "Polyester knit fabrics" meriting classification under Customs Tariff Heading 6002.43; the declared CIF value should not be enhanced and why penalty should not be imposed on them and/or on any other person or persons who might come forward subsequently for claiming the ownership of the imported goods.

5. The respondent M/s Kabul Textiles replied to the show cause and stated that the orders for the supply of the said goods were placed with them by one broker by name Daulat and by relying upon him and who had also placed orders on behalf of other buyers in India earlier, they had agreed to ship/sell the said goods to the said buyer who had informed them that he would give further instructions regarding the name of the buyer so that the bill of lading could be changed to the name of the buyer as Mr. Daulat had informed them that the buyer wanted the description of the goods in generic manner and, as such, they had approached the Shipping

Company for carrying out the necessary amendments in the relevant shipping documents by re-issuing the same with the name of the buyer as notified party and the description of the goods as instructed by Mr. Daulat. The respondent also stated that the goods were shipped directly from China and as per the instructions of Mr. Daulat, and they were to be unloaded in Goa and that the original documents were returned to them by the banks and were in their possession and that the goods exclusively belong to them and no other person had right, title or interest in the said goods. They also referred to the case of "***Union of India Vs. Sampat Raj Dugar" (1992 (58) ELT 163)*** as laying down the law as applicable to their case.

6. However, the Commissioner of Customs and Central Excise found that the General Manifest (IGM) had shown the consignee details "To Order" which was changed to M/s Ayesha Exports, New Delhi, and, who by their letter dated 08.11.2000, wrote to the Shipping Agent that the said consignment belonged to M/s. R. T. & Co.,, New Delhi. He held that the bill of lading indicated that at the instance of the supplier i.e. the respondent, the Shipping Company i.e. to say M/s. Maersk Sealand, had issued switched bills of lading at Dubai by altering the description of the consignment to Polyester Knit Fabrics in place of initial description of

"Polyester Nicky Velour P/D (240 /Gms/Yard) which attracted higher rate of duty and these commissions and omissions indicated that there was an attempt and effort to mis-classify the fabrics adopting the same modus operandi similar to the other importer M/s. Ayesha Exports and M/s. Kazal Impex and, therefore, proceeded to order confiscation of the said goods; imposed penalty of Rs. 73,00,000/- on the respondent (in the case of R.T. & Co.,) and Rs. 42,00,000/- (in the case of Ruchitra Impex) and allowed redemption of the said goods on the payment of redemption fine of Rs.73,00,000/- and Rs.42,00,000/- respectively.

7. The respondent-M/s. Kabul Textiles Limited, having carried an appeal to the CESTAT, the same was allowed by Order dated 13.08.2004. Initially there was divergence of opinion between Member (technical) and Member (judicial) but after it was referred to the third Member(judicial), the third Member concurred with the Member (technical).

8. The learned CESTAT referred to Section 111(d) of the Customs Act,1962 and found that there was no prohibition on the import of actual goods as found in this case or was shown to be existing under the Exim Policy. As regards to Section 111(m) of the Customs Act, 1962, the learned

CESTAT referred to the case of "***Union of India Vs. Sampat Raj Dugar" (1992 (58) ELT 163),*** and held that the respondent was to be allowed re-shipment of the goods since title of the ownership was not in doubt or under any cloud. The learned CESTAT also referred to the case of "***Pacific International Traders" (2002(142) ELT 544)*** and held that on facts as in this case, this Court had permitted re-export of the imported goods and that the SLP filed by the Union of India against the order of this Court in the said case of "***Pacific International Traders" (supra),*** was dismissed by the Honorable Supreme Court as reported in ***2002(143)A-188***. The learned CESTAT also held that the case of "***CC, Kolkata Vs. Grand Prime Ltd" 2003 (155) ELT 417 (S.C.)***, would not be applicable to the facts of this case since in that case, the goods imported were banned and the import was contrary to law in as much as the import was being made without the import license. Consequently, the learned CESTAT proceeded to set aside the order of confiscation and permitted the respondent to export the goods.

9. As far as question (a) is concerned, it may be stated that Section 111 of the Customs Act, 1962 deals with confiscation of improperly imported goods, etc., and provides that the following goods brought from a place outside India, shall be liable to confiscation:-

(a) .....

(b) **.....**

(c) .....

(d)Any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of having imported contrary to any prohibition imposed by or under this Act or by any other law for the time being in force. "

(e) .....

10. It is the contention of the Revenue that the said goods were imported contrary to Section 11 of the Foreign Trade (Development and Regulation) Act, 1992, read with Rule 1 of the Foreign Trade (Regulations) Rules, 1993. Section 7 of the said Foreign Trade (Development and Regulation) Act, 1992, provides that no person shall make any import or export except under a Importer-Exporter Code Number granted by the Directorate General or the Officer authorized by the Director General in this behalf in accordance with the procedure specified in this behalf by the Director General. Sub-Section (1) of Section 11 of the said Act further

provides that no import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the export and import policy for the time being in force. The Revenue seems to contend that the importers in this case had no Code Number assigned to them. However, we must hasten to say that a plea in terms of Section 111(d) of the Customs Act, 1962, read with either Section 7 or Section 11 of the Foreign Trade (Development and Regulations) Act, 1992, was a matter on which the learned Commissioner of Customs and Central Excise himself was silent in the show cause notice, though he held that there was a violation of Section 111(d) of the Customs Act, 1962. In fact the learned CESTAT rightly observed that no notice of confiscation of goods was issued under Section 111(d) of the Customs Act. Both the authorities below have proceeded on the assumption that there was no restriction whatsoever as regards the import of the said goods and the said goods were freely importable.

11. The Revenue cannot be allowed to contend for the first time in second appeals that the goods were sought to be imported in violation of Section 7 or Section 11 of the Foreign Trade (Development and Regulation) Act 1992 read with Foreign Trade (Regulations) Rules 1993. Section 130 of

the Customs Act, 1962 is in pari materia with Section 100, C.P.C., and the Honorable Supreme Court in the case of "***Santosh Hazari Vs. Purushottam Tiwari" (2001) 3 S.C.C. 179***, has stated that a substantial question involved in the case must be not only a question having substance, essential, real, of sound worth, debatable, one which has not been settled earlier by statute or binding precedent and having a material bearing on the outcome of the case but it must also have a foundation in the pleadings and should emerge from sustainable findings of fact reached by court of facts and an answer to such question must be necessary for a just and proper decision of the case. A completely new point raised before the High Court for the first time would not be a question involving a case unless it went to the root of the case. In our view, since the authorities below have proceeded on the ground that the consignments/goods were free from restriction but were chargeable only to a higher duty, the revenue cannot be allowed, now to say that the goods were prohibited goods under Section 111(d) of the Customs Act, 1962 read with Section 7 or 11 of the Foreign Trade (Development & Regulation) Act,1992. In any event, Section 7 of the aforesaid Act would be inapplicable to the case of a foreign supplier like the Respondent.

12. The case of ***"Om Prakash Bhatia v/s. Commissioner of Customs" (2003(155)ELT 423)***, in which the Revenue places reliance, is again a case dealing the confiscation of prohibited goods and the Supreme Court referring to Section 2(3) of the Act, which defines "prohibited goods" stated that the prohibition could be complete or partial and that any restriction on import or export is to an extent a prohibition. This ratio is inapplicable to the case at hand.

13. As regards question (b), it has been submitted on behalf of the Revenue that the Supreme Court in the case of "***Sampat Raj Dugar" (Supra)***, had stated that a person who is a party to any conspiracy or to any fraudulent plan hatched or sought to be implemented would not be entitled to re-export the goods. It has also been submitted that the CESTAT ought to have considered the ratio in the case of "***Commissioner of Customs Vs. Grand Prime Ltd" 2003 (155) ELT 417 (S.C.).***

14. Sub-Section (m) of the Customs Act 1962 reads as follows:-

> "(m) Any goods which do not correspond in respect of value or any other particular with the entry made under this Act or in the case of

baggage with declaration made under Section 77 in respect thereof. "

15. As rightly held by the CESTAT, the word *Entry* has been defined in sub-section (16) of Section 2 of the Customs Act, 1962, to mean in relation to goods, an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in Section 82 or the entry made under the regulations made under Section 84.

16. Admittedly, the respondent M/s. Kabul Textiles were not issued with any notice to show cause alleging that they were a party to any conspiracy with the importers to evade any customs duty. It is quite probable that at the request of the said Daulat, the respondent agreed to change the invoices/Import Manifest thereby altering the description of the goods but, as rightly held by the CESTAT, the same is insufficient to invoke sub-section (m) of Section 111 of Customs Act, 1962, as the word *Entry* in the said sub-section is restricted to a bill of entry which was admittedly not filed in the present case. The CESTAT was therefore right in concluding that even in case where the description was changed either in the invoices

or in the bill of lading or the Import Manifest, the same was not sufficient to call for confiscation liability of the goods under Section 111(m) of the Act.

17. In the case of "***Union of India Vs. Sampat Raj Dugar" (Supra),*** the Honorable Supreme Court speaking through three learned Judges, held that in case an importer of goods when he abandoned them i.e. to say where he does not pay for and receive the documents of title, the exporter would be still the owner of the goods and condition(ii) in sub-clause(3) of Clause (5) of the Imports (Control)Order and the Imports and Exports(Control) Act, l947, would not deprive the exporter of his title to the said goods and he would be entitled to re-export them. In our view, the CESTAT was right in concluding that the respondent who was the supplier of the goods could not be assumed to be a part of conspiracy to import the said goods to Marmugoa, Goa. This is more so because not even a show cause notice was issued to the respondent and his explanation sought regarding the alleged conspiracy. It is quite probable that the changes were done by the respondent at the instance of the said Daulat to oblige him to get orders without any intention to help the importers to evade duty. The CESTAT was also right in placing reliance on the decision

of this Court in the case of "***Pacific International Traders" (Supra),*** wherein on facts similar to this case, this Court permitted re-export of the imported goods. Indeed, this Court in the case of "***Pacific International Traders" (supra),*** had also relied upon another case of "***J. P. Electronics Pvt. Ltd v. Union of India and Ors.,"*** wherein it was observed as follows :-

> "It is pertinent to note that in case of the first consignment which arrived on 30-6-2000, necessary steps were taken and proceedings are being held for the alleged undervaluation against M/s. Rahul Associates. However, it seems that the second consignment which was sent to M/s. Rahul Associates is detained only on the assumption that it would have been undervalued. Significantly, it cannot be overlooked that M/s. Rahul Associates had not filed any Bill of Entry or import document, and in fact they expressed their intention to abandon the goods due to their bad financial condition. Hence, the second consignment which is in dispute, cannot be linked with the first consignment which was allegedly undervalued only because it was also sent in the name of M/s. Rahul Associates, especially when M/s. Rahul Associates have not claimed any right, title or interest to the goods nor have presented bill of entry or any import document claiming the goods from the date of detention and hence it would not be legal and proper

on the part of the respondents to detain the goods which are abandoned by the consignee."

In our view, the aspect of Section 111(m) of the Customs Act, 1962, has been directly and squarely covered by the Judgment of this Court in the case of "***Pacific International Traders "(Supra).*** The learned second Judicial Member of CESTAT had referred to the case of ***"Dynacast Industries Vs. C.C.(P) (1999(113) ELT 524(T)***, wherein the CESTAT had held the same view. In our view, the CESTAT rightly distinguished the case of ***Commissioner of Customs v. Grand Prime Ltd.***, as not applicable to the facts in that the goods i.e. raw silk was restricted and could be imported only against licence unlike in this case where both the authorities below have come to the conclusion that the goods were freely importable. As long as no bill of entry was filed, as contemplated by Clause (m) of Section 111 of the Customs Act, 1962, the goods could not be said to have not corresponded in respect of value shown with the said entry, in the bill of entry. The CESTAT, was again right in holding that as confiscation could not be upheld, there could be no cause or penal action as well under Section 112 of the Customs Act 1962.

18. After having considered the Judgment of CESTAT dated

13.08.2004, in our view, the first question (a) does not arise and question (b) has been rightly answered by the learned CESTAT by considering the law laid down by the Honorable Supreme Court in the case of ***Sampat Raj Dugar (supra)*** as well as **Pacific International Traders(supra).**

19. We, therefore, find that there is no merit in these appeals and consequently, the same are hereby dismissed.

A. P. LAVANDE,J.

N.A.BRITTO,J.

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